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Supreme Court of the United States

OCTOBER TERM, 1955

No. 100

EARL LEROY SCOTT, and HARRY D. CRONE, Executor Estate of ESTHER SCOTT CRONE, Deceased, *Petitioners*,

v.

HERBERT WILSON, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Earl LeRoy Scott and Harry D. Crone, Executor, Estate of Esther Scott Crone, Deceased, Petitioners, pray that a writ of certiorari issue to review the orders of the Supreme Court of Ohio overruling Petitioners' Motion to Certify the Record from the Court of Appeals, Fayette County, Ohio, and denying Petitioners' Application for Rehearing.

OPINIONS BELOW

The proceeding against Respondent originated in the Court of Common Pleas, Fayette County, Ohio, which Court rendered an opinion in favor of Petitioners on April 12, 1955. Said opinion is not reported and is attached hereto as Appendix A.

The Court of Appeals, Fayette County, Ohio, reversed the judgment of the Court of Common Pleas in an opinion rendered November 8, 1955. The judgment and decree of said Court was entered November 21, 1955, is not reported and is attached hereto as Appendix B.

The Supreme Court of Ohio overruled Petitioners' Motion to Certify the Record on February 8, 1956, and denied Petitioners' Application for Rehearing on February 29, 1956. The said orders are not reported and are attached hereto as Appendix C.

JURISDICTION

The order of the Supreme Court of Ohio overruling Petitioners' Motion to Certify the Record from the Court of Appeals, Fayette County, Ohio, was entered February 8, 1956, and the order denying Petitioners' Application for Rehearing was entered February 29, 1956, thereby finalizing the judgment and decree of the said Court of Appeals in favor of Respondent.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

The following questions which are presented for review are intended to refer to the judgment and decree of the Court of Appeals, Fayette County, Ohio, as well as to the orders of the Supreme Court of Ohio.

I. Did the Supreme Court of Ohio deprive Petitioners of their constitutional rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in dismissing their Petition to quiet title to real property and granting Respondent's cross-petition to partition said property, on the alleged ground that a judgment in a prior case was *res judicata,*

(a) When the issues in the instant case were not the same as in the prior case and in fact were not even presented, controverted, investigated or determined by the Court in the prior case?

(b) When the issues in the instant case were only incidentally cognizable in the prior case and the evidence sustaining the issues in the prior case could not sustain the issues in the instant case?

(c) When the cause of action in the prior case was not between the same parties and the parties in the instant case were not even adversary parties in the prior case?

II. In the event the judgment in the prior case is not conclusive as to the issues in the instant case, did the Supreme Court of Ohio err in failing to hold that under the laws of Ohio a remainderman of a fee-tail estate cannot alienate or devise his interest in property until the first donee in-tail dies?

III. Irrespective of whether the judgment in the prior case is or is not conclusive as to the issues in the instant case, did the Supreme Court of Ohio err in failing to hold that any claimed right, title or interest of Respondent was barred by the statute of limitations?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

The pertinent provision of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "* * * Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are:

Section 2305.04, Ohio Revised Code.

> "An action to recover the title to or possession of real property shall be brought within 21 years after the cause thereof accrued, but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of minority, of unsound mind, or in prison, such person, after the expiration of 21 years from the time the cause of action accrues, may bring such action within 10 years after such disability is removed."

Section 5303.01, Ohio Revised Code.

> "An action may be brought by a person in possession of real property by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

STATEMENT OF CASE

On August 16, 1954, Petitioners filed an action in the Court of Common Pleas, Fayette County, Ohio, to quiet title to a parcel of real property consisting of 47 acres situate in Fayette County, Ohio, adjoining the city limits of Washington Court House, and Respondent filed a cross-petition to partition the said 47 acres. Petitioners alleged that they had been in possession of the real property for a long time; that they had title in fee simple as tenants in common; and that Respondent claimed an undivided one-third interest without any right whatever. (R. 19)

The respective claims of Petitioners and Respondent arose as follows:

On April 3, 1906, John B. McLean, then a widower, executed a deed in fee-tail conveying a tract of land including the 47 acres in question to his daughter, Estella M. Scott, the *granting* clause being "to the said Estella M. Scott for and during her natural life and the remainder to the heirs of her body, their heirs and assigns forever", and the *habendum* clause being "to have and to hold the same to the only proper use of said Estella M. Scott for and during her natural life and the remainder to the heirs of her body, their heirs and assigns forever". (R. 63)

Subsequent to the execution of the deed, John B. McLean remarried and thereafter died on May 26, 1916. Following his remarriage he executed two wills. On July 24, 1914, he executed a will in which he devised the forty-seven acre tract to his daughter, Estella M. Scott, for life, with remainder to her children, Flossie Scott, Esther Scott and Earl LeRoy Scott in fee simple. (R. 86) This will was admitted

to probate in Franklin County, Ohio. Thereafter, John B. McLean suffered a serious head injury, was adjudged incompetent and a guardian was appointed for him. However, on December 29, 1915, he executed another will in which he devised the 47 acre tract to his wife, Mary F. McLean, for her natural life and after her death to the three grandchildren, Flossie Scott, Esther Scott and Earl LeRoy Scott. This will was admitted to probate in Fayette County, Ohio. (R. 42) At the time of the death of John B. McLean he was survived by his widow, Mary F. McLean, his daughter, Estella M. Scott, and her three children, Flossie, Esther and Earl, the latter two being the Petitioners herein.

Thereafter, a dispute arose between the widow and the daughter as to who was entitled to possession of the 47 acre tract, each claiming a life estate. The widow's claim was based on the second will of December 29, 1915, and the daughter's claim was based on the deed of April 3, 1906.

On January 2, 1917, a petition was filed on behalf of Estella M. Scott and her three children, Flossie Scott, Esther M. Scott and Earl LeRoy Scott, against the widow, Mary F. McLean, and others, in the Court of Common Pleas, Fayette County, Ohio, being Cause No. 14,696, to quiet title to the 47 acres. The petition, which was filed and verified by an attorney and not by any of the plaintiffs personally (R. 44), alleged that "the Plaintiff, Estella M. Scott, is the owner of an estate for the term of her life" in the land in question, "and in possession thereof; and that said Plaintiffs, Flossie Scott, Esther Scott and Earl E. Scott (sic), are the owners of estate in remainder in said lands after the termination of said life estate of

said Estella M. Scott", and "the said plaintiff, Earl E. Scott is a minor and prosecutes this suit by Estella M. Scott, his mother and next friend". (R. 40) No guardian *ad litem* was appointed for the minor plaintiff, Earl LeRoy Scott.

The sole issue in Cause No. 14,696 was to determine whether a life interest in the property in question passed to the daughter pursuant to the deed of April 3, 1906, or passed to the widow pursuant to the will of December 29, 1915. (R. 40) The Court found that the deed prevailed and the plaintiffs were "entitled to relief asked for in said Petition". The entry of judgment recited:

> "It is therefore ordered and adjudged that the title of said plaintiffs in and to the said lands described in their petition be and it is hereby forever quieted in said plaintiff, Estella M. Scott, for and during the term of her natural life, and in said plaintiffs, Flossie Scott, Esther Scott and Earl E. Scott, after the determination of the life estate of Estella M. Scott in fee simple in remainder, against any claim or demand of said defendants, or either of them, * * *". (R. 56)

In 1921 Flossie Scott, one of the children of Estella M. Scott, married Clarence Wohlheter. She died on November 20, 1931, seventeen years before her mother, leaving a will dated August 13, 1930, under which she devised to her surviving husband, Clarence, all real estate of which she was seized at the time of her death. (R. 74)

On June 23, 1934, Clarence Wohlheter, the surviving husband of Flossie Scott Wohlheter, filed an action to quiet title to the 47 acres in question in the Court of Common Pleas, Fayette County, Ohio, being Cause

No. 18,145, against his mother-in-law, Estella M. Scott, and her two surviving children, Esther Scott Crone (she having married Harry D. Crone) and Earl LeRoy Scott, the latter two being the Petitioners in the instant case. In his petition he alleged that the deed of April 3, 1906, was invalid and based his claim of ownership under the will of John B. McLean, dated December 29, 1915, which devised, subject to a life estate, an undivided one-third interest in said 47 acres to his wife, Flossie Scott Wohlheter, and which she in turn had devised to him. (R. 103)

On May 31, 1935, the Court of Common Pleas found that the deed of April 3, 1906, was a valid instrument and conveyed title to Estella M. Scott, "for the term of her natural life with remainder to the heirs of her body, their heirs and assigns forever", and "that the will of John B. McLean, executed after the delivery of said deed was inoperative to pass the title as alleged in said petition". (R. 112) No appeal was taken and the decree of the Court became final.

The first donee in-tail, Estella M. Scott, died on October 2, 1948, and on October 9, 1948, Clarence Wohlheter, still litigious, filed an action against Esther Scott Crone and Earl LeRoy Scott (Petitioners herein) in the Court of Common Pleas, Fayette County, Ohio, Cause No. 20,673, to partition the said 47 acres again claiming title as devisee of Flossie Scott Wohlheter. (R. 120) On June 8, 1951, Wohlheter's counsel dismissed the action without prejudice. (R. 126)

On February 12, 1953, Clarence Wohlheter purported to convey by quit-claim deed all of his claimed interest in the 47 acres to Herbert Wilson, the Respondent herein. (R. 81) On the strength of said

quit-claim deed, Respondent claimed an undivided one-third interest in said 47 acres and Petitioners brought the instant action to quiet title once and for all.

In the Court of Common Pleas below, Respondent traced his title to Flossie Scott Wohlheter and contended that the judgment and decree in Cause No. 14,696 altered the effect of the deed of April 3, 1906, by determining the interests not only of John B. McLean's widow and daughter which were in issue, but also of the three grandchildren, Flossie Scott Wohlheter, Esther Scott Crone and Earl Leroy Scott, which was not in issue. In other words, Respondent contended that the three grandchildren, instead of having an expectancy or bare possibility under the deed which, under the laws of Ohio, could not be alienated or devised during the life of the first donee in tail (their mother, Estella M. Scott), had acquired, by reason of the language employed by the Court in Cause No. 14,696, a vested remainder in fee simple subject to the life estate in their mother, which could be alienated and devised; and that the judgment in Cause No. 14,696 was *res judicata* and could not now be collaterally attacked. (R. 21)

Petitioners contended that under the deed of April 3, 1906, any interest which the children of Estella M. Scott might have by reason of being issue of a donee in tail, was contingent upon surviving their mother and, therefore, they had no alienable or devisable estate until after the death of their mother, the first donee in tail; that Flossie Scott Wohlheter, having predeceased her mother, had no interest in the 47 acres which could pass under her will to her husband, Clarence Wohlheter; that the quit-claim deed to Respondent conveyed nothing to him; and that the

judgment in Cause No. 14,696 was not *res judicata* because the question as to what estate the grandchildren took under the deed of April 3, 1906, or between themselves, was not in issue in Cause No. 14,696. (R. 26)

On April 25, 1955, the Court of Common Pleas found in favor of Petitioners and held that they were entitled to the relief sought and accordingly dismissed the cross-petition of Respondent. In its opinion the Court found that Flossie Scott Wohlheter, having predeceased her mother, had no interest which she could alienate during her lifetime or devise by will. As to whether the judgment in Cause No. 14,696 was decisive as to the interest of Flossie Scott Wohlheter and her successors in title, the Court said:

> "The question of the estates of the Plaintiffs *inter sese* was not an issue in the litigations of 1917 and, therefore, any judgment purporting to fix and determine those interests *inter sese* would be a nullity. Consequently, no title could be derived from such a judgment nor could it be the basis of an estoppel". (Appendix A)

An appeal on question of law was taken by Respondent to the Court of Appeals, Fayette County, Ohio. On November 8, 1955, the Court of Appeals found that the judgment of the Trial Court in Cause No. 14,696 adjudged the right, title and interest of the three grandchildren (the Petitioners and the Respondent's predecessor in interest) in that action; that the remainder interest in fee simple of each of the three grandchildren was vested; and that said judgment was *res judicata*. The court accordingly directed that the petition of the Petitioners should be dismissed and that the cross-petition of Respondent

should be granted. On November 21, 1955, the Court entered the order set forth in Appendix B.

A Motion to Certify the Record was filed by Petitioners in the Supreme Court of Ohio and on February 8, 1956, the same was overruled. Thereafter, an Application for Rehearing was filed by Petitioners and on February 29, 1956, the same was denied. (Appendix C)

The constitutional question sought to be reviewed was raised by exception to the judgment and decree of the Court of Appeals, which exception was duly noted on the Journal Entry filed November 21, 1955 (R. 12), and also by Assignments of Error filed in the Supreme Court of Ohio. (R. 13)

REASONS FOR GRANTING THE WRIT

I.

A Judgment in One Suit Is Not Res Judicata in Another When the Issues and Questions to be Decided Are Not the Same

The primary question is whether this suit involves the same claim, demand, or cause of action as was involved in the prior suit in Cause No. 14,696. To resolve this question, it is necessary to ascertain the issues in each case.

In Cause No. 14,696 (hereinafter referred to as the "prior suit"), the sole issue was to determine whether title to the property in question passed to Estella M. Scott (mother of Petitioners and Respondent's predecessor in interest) under a deed which created a fee-tail estate or passed to Mary F. McLean under a will which created a life estate with remainder in fee. In other words, the sole issue was whether the deed or the will should prevail. (R. 40)

The Court held that the deed prevailed and that the will was inoperative to pass title to the property in question. (R. 56) The question as to who would take upon the death of the first donee in-tail was not an issue in the prior suit and the Court of Common Pleas below so found. In its opinion, said Court specifically stated:

> "The question of the estates of the plaintiffs *inter sese* was not an issue in the litigations of 1917 (Cause No. 14,696) and therefore any judgment purporting to fix and to determine those interests *inter sese* would be a nullity. Consequently, no title could be derived from such a judgment nor could it be the basis of an estoppel". (R. 32)

No identity existed between the cause of action in the prior suit and the cause of action in the instant suit. The instant suit was a cause of action instituted by two individuals claiming title under a deed in fee-tail as heirs of the body of the first donee in-tail (by reason of having survived her), against a person claiming title as successor to an individual who was not an heir of the body of the first donee in-tail because she did not survive such donee. There is no question but that the prior suit was to determine which of two life tenants was entitled to possession of the 47 acres in question; while the instant suit was to determine the estate, if any, of the three children of the first donee in-tail *following her death.*

It is well settled that a matter in dispute may be the same in two actions and yet involve different causes of action. Where the cause of the two actions is different a prior judgment is no bar to a subsequent action. *Heck* v. *Hlavin,* (App.) 103 N.E. (2) 282, 61 O.L. Abs. 270.

It is equally well settled that when the second suit is upon a different claim or demand or cause of action, the judgment in the first suit operates as an estoppel only as to the points or questions *actually litigated and determined.* In short, in order to make a judgment at law conclusive in a subsequent suit on a different cause of action, the matters attempted to be disputed in the subsequent suit must have been put in issue in the first action and therein necessarily tried and determined. *Babcock* v. *Camp,* 12 O.S. 11, *Lore* v. *Truman,* 10 O.S. 45. The matters which are the subject of dispute in the instant suit were not put in issue in the prior suit and, therefore, such matters were never tried and determined. It follows that judgment in the prior suit should not operate as an estoppel.

It is also clear that an adjudication affects no claims which the Petitioners had no opportunity to litigate; and that the record works an estoppel only as to those matters which were capable of being controverted between the parties at the time of the proceeding in the prior suit. In the instant case, the estates of Flossie Scott Wohlheter, Esther Scott Crone and Earl LeRoy Scott, if any, have been put in issue. In the prior suit in which all 3 were joined as plaintiffs, the character and extent of their respective estates under the deed of April 3, 1906, was not put in issue and was not capable of being controverted between the parties at the time of the proceedings in the prior suit. *State Ex Rel Kidder* v. *Eagle Insurance Co.,* 50 O.S. 252, 33 N.E. 1056. Judgment aff'd 153 U.S. 446, 38 L.ed. 778. Nowhere does it appear in the record in the prior suit that the precise issues raised in the instant suit were determined in the prior suit. *Russell* v. *Place,* 94 U.S. 606, 24 L.ed. 214.

The theory of the law is that matters which have been fully investigated between the parties and determined by the Court shall not be again contested, and that the judgment of the Court upon matters thus determined shall be conclusive on the parties and never be subject to further inquiry. But a judgment in one action is not conclusive as an estoppel in another action as to points not actually litigated in the original action. *McComb* v. *Frink*, 149 U.S. 629, 37 L.ed. 876, *United States* v. *International Building Co.*, 345 U.S. 502, 97 L.ed. 1182, *Cromwell* v. *County of Sac*, 94 U.S. 351-353, 24 L.ed. 195, 197, 198. In the *Cromwell* case this Court said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In summary, the issues in the instant suit were not presented, controverted, investigated or determined by the Court in the prior suit and therefore the judgment in the prior suit is not operative as an estoppel in a suit which is based entirely on a different cause of action. PARTMAR CORP. v. PARAMOUNT PICTURES THEATERS CORP., 347 U.S. 89, 98 L.ed. 532.

II.

Res Judicata Is Not Available When the Issues to be Decided Were Only Incidentally Cognizable in the Prior Suit

In the prior suit the Court of Common Pleas found in favor of the deed of April 3, 1906, and that the plaintiffs in that suit were entitled to the relief prayed for. In its opinion, it held:

> "It is, therefore, ordered and adjudged that the title of said plaintiffs in and to the said lands described in their petition be and it is hereby forever quieted in said plaintiff, Estella M. Scott, for and during the term of her natural life, and in said plaintiffs, Flossie M. Scott (Wohlheter), Esther Scott (Crone) and Earl E. (LeRoy) Scott, after the determination of the life estate of Estella M. Scott in fee simple in remainder, against any claim or demand of said defendants, or either of them, * * * ".

The Court of Common Pleas below held that the portion of the judgment above quoted purporting to fix the interests of Flossie, Esther and Earl was not in issue and any attempt to determine their interests would be a nullity and could not be the basis of estoppel. However, the Court of Appeals below reached an opposite conclusion, ruling that the judgment of the Trial Court in Cause No. 14,696 adjudged the right, title and interests of the plaintiffs, respectively, in that action; that the remainder interests in fee simple of each of the three children was vested; and that said judgment was *res judicata.*

Aside from the fact that the Court of Appeals erred in holding that the remainder interest of each of the 3 children was vested, as will be more fully shown in Part IV, *infra*, the fact remains that the so-called

remainder interest of the 3 children, as determined by the Trial Court in Cause No. 14,696, was not *res judicata* for the following reasons:

Any attempt by the Court in the prior suit to adjudge the respective interests of the 3 children constituted a finding which was not necessary for a judgment on the sole issue in that case, namely, did the deed or the will of John B. McLean prevail. This Court has frequently held that a finding which is not material to the principal action, or which is not necessary for a judgment, does not form the basis for a collateral estoppel. *Partmar Corp.* v. *Paramount Pictures Theaters Corp., supra.*

The character and extent of the estate which the three children took was considered only collaterally or incidentally by the Court in the prior suit in its determination of the main issue. It is well settled that the rule as to the conclusiveness of a judgment or decree of a court does not apply to points which, as in the instant case, come only collaterally under consideration or are only incidentally considered, or which is closer to the actuality in this case, can only be argumentatively inferred from the decree. *Hopkins* v. *Lee*, 6 Wheat 109, 5 L.ed. 218; *Norton* v. *McLarney*, 266 U.S. 511, 69 L.ed. 413; *North Carolina R. Co.* v. *Story*, 268 U.S. 288, 69 L.ed. 959.

As a matter of fact, the litigation in the prior suit did not give the three children an opportunity to be heard on the question as to what estates they took *as between themselves* because that matter was not in question. In any event, it would have been premature because all they had at that time was a bare expectancy which would ripen into an estate in possession only

after the death of their mother, the first donee in-tail. The three children could only have been heard on the question as to whether they took under the deed or under the will. This Court has frequently found that judgments become estoppels only because they affect matters upon which the parties have been heard but are not conclusive upon matters not in question or matters which are immaterial to the cause of action. *Radford* v. *Myers*, 231 U.S. 125, 58 L.ed. 454

Assuming, *arguendo*, that the Court in the prior suit adjudged that the interests of the three children under the deed of April 3, 1906, were vested in them at the time of that litigation, as the Court of Appeals below erroneously concluded that it did, such adjudication was obviously of a matter that was not presented for determination and of a matter not so necessarily involved as an issue that the judgment could not have been rendered without deciding that particular matter. *Lore* v. *Truman*, *supra*; *Rempe* v. *Ravens*, 68 O.S. 113, 67 N.E. 282. In other words, in order that a judgment may operate as *res judicata* and be conclusive evidence of a fact sought to be established by it, it must be made to appear that such fact was a material one in the prior suit. *Partmar Corp.* v. *Paramount Pictures Theaters Corp.*, *supra*.

A determination of the interests of the three children was not relevant or material in deciding the sole issue in the prior suit as the relief prayed for could have been granted without deciding the particular interest of the three children. It follows, therefore, that the judgment in the prior suit was no bar to the instant suit, especially where the second suit, as demonstrated in Part I, *supra*, is not for the same cause of action as in the prior suit.

The best and most accurate test as to whether a second suit is for the same cause of action as the first is to consider whether the same evidence would sustain both. *Ohio Fuel Gas Co.* v. *Mt. Vernon*, 37 O. App. 159, 174 N.E. 260. Petitioners respectfully submit that the evidence which sustained the judgment in the prior suit could not sustain a judgment in the instant case, whether it be for Petitioners or for Respondent, for the obvious reasons that since the judgment in the prior suit the first donee in-tail had died, thereby finally determining the persons who constituted the "heirs of her body"; and that the "heirs of her body" did not include Respondent's predecessor in interest as she had died prior to the first donee in-tail. In order for a trial court in an action to find that the judgment in a separate action is *res judicata* on the issues being tried, it would be required to find that the issues were identical and sustained by the same evidence. *Suburban Mortgage Co.* v. *Hopwood*, 83 O. App. 115, 81 N.E. (2d) 387. This, the Court of Appeals below failed to do.

Moreover, no evidence was introduced in the prior suit, nor was it necessary, to construe the deed in order to determine just what estates "the heirs of her body" took under the deed. The judgment in the prior suit is not conclusive of any question which, from the very nature of the case against the widow, Mary F. McLean, could not have been adjudicated in that suit. *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 64 L.ed. 507.

The fact of the matter is that the portion of the judgment in the prior case which Respondent alleges purported to fix the interests of Flossie, Esther and Earl, was an isolated passage and may aptly be described as immaterial, irrelevant and redundant. The

effect of a decree as an adjudication conclusive upon the parties should not be determined by isolated passages, but upon an examination of issues made and intended to be submitted, and which it was intended to decide. *Oklahoma* v. *Texas*, 272 U.S. 21, 71 L.ed. 145. It goes without saying that in the prior suit the interests of the three children *as between themselves* were neither made nor intended to be an issue, nor was it intended that such interests should be determined.

In summary, the doctrine of res judicata is not available to bar the instant case when the issues to be decided were only incidentally cognizable in the prior suit and the evidence which sustained the issues in the prior suit could not sustain the issues in the instant case.

III.

Res Judicata Is Not Available When the Cause of Action in the Prior Suit Was Not Between the Same Parties Nor When the Parties in the Instant Case Were Not Adversary Parties in the Prior Suit

In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties. *Hughes* v. *United States*, 4 Wall 232, 18 L.ed. 303. Any such judgment, however, is not conclusive on the parties in subsequent litigation unless they were adversary parties in the prior suit. *McCrory* v. *Park*, 18 O.S. 1, *Koelsch* v. *Mixer*, 52 O.S. 207. It is well settled in this Court and elsewhere that a judgment in a prior suit reaches and concludes only *parties to the issue* and does not affect persons who, though parties to the suit, were not adversary parties to the issue upon which the judgment was rendered.

It should be remembered that in the prior suit the Petitioners and Respondent's predecessor in interest were joined with their mother as parties plaintiff for the purpose of disputing the claim of John B. McLean's widow that she was entitled to a life estate under a will which became effective more than 10 years after the execution of the deed under which they claimed. At no time in the prior suit did they have a position adversary to each other. At that time they had a common interest in asserting that the deed from John B. McLean passed title to the 47 acres and that the will of John B. McLean was inoperative to pass title to his widow. As stated above, they had a mere expectancy which would vest upon the death of their mother, *provided they survived her*, which would increase or diminish in size depending upon the number of persons who constituted the class qualifying as heirs of the body of Estella M. Scott at the time of her death.

In summary, the Court of Appeals below erred in holding that the judgment in the prior suit was res judicata of the issues in the instant case and the judgment of the Court of Appeals should be reversed for the reason that the cause of action in the prior suit was not between Petitioners and Respondent's predecessor in interest nor were they in any respect adversary parties either on the record or in fact.

IV.

During the Life of a Donee in Fee-Tail, the Issue of Such Donee Have No Estate or Interest in the Property Which can be Alienated or Devised

The title which Respondent claims was derived from Flossie Scott Wohlheter. It is the position of Petitioners that Flossie, at the time of her death, had no

estate in the 47 acres which she could devise to her husband, Clarence Wohlheter, and accordingly the latter had no estate which he could convey by quit-claim deed to Respondent.

The interest which Flossie believed she possessed arose by reason of the fact that she was a child of Estella M. Scott, donee in-tail, under the deed of April 3, 1906. Under this instrument, John B. McLean conveyed the land "to the said Estella M. Scott for and during her natural life and the remainder to the heirs of her body, their heirs and assigns forever". Under the laws of Ohio, this created an estate in fee-tail. Since Flossie predeceased her mother by 17 years, did she at the time of her death possess an estate which she could devise by will? The law in Ohio, under the authority of *Dungan* v. *Kline*, 81 O.S. 371, is clear and undisputed that she did not.

In the *Dungan* case, the donee was Elizabeth Wilson. She had seven children, among whom were William and George. Both William and George predeceased their mother, but during their lifetime each conveyed an undivided one-seventh interest to George Dungan, who thereafter conveyed said interests to Harriet Dungan. The Court held that the issue of a donee in-tail, during the life of such donee, has no estate or interest in the lands which he can alienate. In its opinion, the Court quoted with approval the following language from *Dart* v. *Dart*, 7 Conn. 250:

> "But if he has no rights, nothing passes, not even a chose in action, what estate then had the issue of the first donee in-tail during his life? The answer is, none. Such is only an heir apparent or presumptive. His title is the bare possibility or mere chance of becoming eventually the heir in-tail; for the maxim is *Nemo est haeres*

> *viventis* and it is a well settled rule that a mere possibility cannot be released or conveyed; and the reason therefor is, that a release supposes a right in being."

Another landmark case in Ohio is *Carter* v. *Grosnickle*, 11 Ohio N.P. (NS) 465. This case was affirmed by the Court of Appeals and later by the Supreme Court of Ohio without opinion in 88 O.S. 577.

In the *Carter* case, the testator devised to his daughter and the heirs of her body 100 acres of land, thus creating a fee-tail estate in his daughter. A few years later the daughter deeded her interest in the 100 acres to one of her brothers, which brother, during the course of 22 years and during the life of the daughter, secured quit-claim deeds from 6 of the 8 children of the daughter. The Court held that under the decision in *Dungan* v. *Kline*, *supra*, the children had no estate in the land during the life of their mother which they could alienate. See also, *In Re Youtsey*, 206 Fed. 423.

As pointed out in Part III, *supra*, the "heirs of the body" of Estella M. Scott could not be determined until her death, as no one has heirs while living. The heirs of the body of Estella M. Scott constituted a class which could be enlarged by the birth of additional issue or diminished by reason of the death of issue at any time prior to the death of Estella M. Scott. It is inescapable that in order for an undivided interest in fee to vest in Flossie as an heir of the body of Estella M. Scott, she would have to be living at the time of her mother's death. Then and only then could Flossie acquire an estate which could be alienated or devised.

In summary, the decisions of the Ohio Courts do not justify the pronouncement of the Court of Appeals

below that Respondent's predecessor in interest, Flossie Scott Wohlheter, had a vested interest at the time of her death in the 47 acres which could be devised by will. For the foregoing reasons the judgment of the Court of Appeals should be reversed.

V.

Respondent Is Barred by the Statute of Limitations

The Court of Appeals below held that inasmuch as the judgment in the prior suit was *res judicata*, the statute of limitations did not constitute a bar to Respondent's claim. Petitioners believe that they have shown conclusively that the plea of *res judicata* is not available in the instant case. But irrespective of that fact, they contend that any possible claim Respondent may have in and to the 47 acres in question was barred by limitation on November 21, 1952, for the cogent reason that he or his predecessor in interest could have asserted his rights against the 47 acres the day after Flossie's will was admitted to probate, to wit, November 21, 1931, by virtue of the provisions of Section 5303.01, Ohio Revised Code, *supra*.

Flossie Scott Wohlheter died on November 20, 1931. Her devisee, Clarence Wohlheter, could have brought suit at any time thereafter to quiet his alleged title or to partition the real property. He did in fact file an action to quiet title in the Court of Common Pleas, Fayette County, Ohio, against Estella M. Scott, and Petitioners herein on June 23, 1934, in Cause No. 18,145, but that case was decided against him on May 31, 1935. Thirteen years later, on October 9, 1948, he filed an action in the same Court against the Petitioners herein, Cause No. 20,673, to partition the 47 acres but he dismissed that case without prejudice on June 8, 1951.

It is fairly apparent from the long history of litigation involving the 47 acres, commencing first in 1917, that an end to litigation should be reached. Even if we assume, *arguendo*, that Flossie had a vested interest which she could devise to her husband and which he could convey to Respondent, the conclusion is inescapable that Respondent and his predecessor in interest were neither vigilant nor did they prosecute their rights in a timely fashion.

In Ohio, the statute provides that "an action to recover the title to or possession of real property shall be brought within 21 years after the cause thereof accrued." See Section 2305.04, Ohio Revised Code, *supra*.

In summary, Respondent has slept on his rights and the erroneous conclusion of the Court of Appeals below that the claim of Respondent is not barred by the statute of limitations should be corrected.

CONCLUSION

The Supreme Court of Ohio, in dismissing the Petition to Quiet Title, has deprived Petitioners of their constitutional rights without due process of law in violation of the Fourteenth Amendent to the Constitution of the United States. The doctrine of *res judicata* is not a valid defense to the action brought by Petitioners to quiet title to their land, for the reason that the judgment in the prior suit, contrary to the finding of the Court of Appeals, did not adjudge "the right, title and interest" of Petitioners and of Flossie Scott Wohlheter, Respondent's predecessor in interest, for the reasons set forth at length in Parts I, II and III above.

Moreover, the Court of Appeals erred in holding that the interest of Respondent's predecessor in title became vested as a result of the judgment in the prior suit. The law in Ohio is well established and clear that during the life of a donee in-tail the issue of such donee has no estate or interest in the property which can be alienated or devised, as more fully shown in Part IV above.

The Court of Appeals, Fayette County, Ohio, also committed reversible error in holding that the claim of title asserted by Respondent in the instant case is not barred by the statute of limitations as more fully shown in Part V above.

WHEREFORE, Petitioners pray that this Petition for a Writ of Certiorari be granted to the end that the judgment and decree of the Court of Appeals, Fayette County, Ohio, may be reversed by this Court.

Respectfully submitted,

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Of Counsel

APPENDIX A

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, OHIO

No. 21843

EARL LEROY SCOTT AND ESTHER SCOTT CRONE, *Plaintiffs*,

vs.

HERBERT WILSON, *Defendant*.

Decision

KIRK, J. (sitting by assignment)

The objections to the introduction of evidence reserved for decision are now each overruled.

Plaintiffs Scott and Crone by their petition seek to quiet title to 47 acres of land as against defendant Wilson. Defendant Wilson by answer sets up several defenses based upon facts which will be set out hereafter and claims to be the owner of an undivided one-third of the land in fee simple and by cross-petition seeks an accounting of rents and partition. Plaintiffs' reply and answer raises no additional issues.

By quit-claim deed dated April 3, 1906, John B. McLean conveyed the land and other real property to his daughter Estella B. Scott for a stated consideration of one dollar, love and affection, the granting clause being "does hereby remise, release and forever quit claim to the said Estella Scott for and during her natural life and remainder to the heirs of her body their heirs and assigns forever" and the habendum clause being "to have and to hold the same to the only proper use of the said Estella Scott for and during her natural life and remainder to the heirs of her body their heirs and assigns forever."

This deed was delivered to a third party with instructions that it be delivered to Estella Scott at the death of the grantor which was done.

Subsequent to the execution of the deed and its delivery to the third party, McLean executed a will by which he devised the land "to my daughter Estella Scott of Columbus, Ohio, for and during her natural life, with remainder after said life estate over to her children and their heirs." And by a later will he devised a life estate in the land to his wife with remainder to his "three grandchildren, Flossie Scott, Esther Scott and Earl Scott, children of my daughter Estella M. Scott, their heirs and assigns forever."

Due to some question of his domicile both wills of John B. McLean were admitted to probate, the earlier will in Franklin County and the later will in Fayette County.

At the date of the death of John B. McLean in 1916, Estella Scott was living and had three children living, Flossie, Esther and Earl, the latter two being the plaintiffs here.

In 1917 a petition was filed in this court on behalf of Esther M. Scott and her three children, wherein it was averred that "the plaintiff, Estella M. Scott, is the owner of an estate for the term of her life" in the land in question, "and in possession thereof; and that said plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott, are the owners of the estate in remainder in said lands after the termination of said life estate of the said Estella M. Scott." "The said plaintiff, Earl E. Scott, is a minor and prosecutes this suit by Estella M. Scott, his mother and next friend." The defendants in that action were the widow, the executors under each will and two other beneficiaries under the wills.

The petition in that cause sets out the deed from McLean in 1906, reciting that it conveyed to Estella M. Scott "an estate for the term of her life in said premises and to the heirs of her body an estate in remainder therein in fee simple." It also set out the two wills, averring that the testator was incompetent when he executed the second.

The prayer of the petition was that plaintiffs title to said real estate be quieted. The petition was signed and verified by an attorney for plaintiffs and not by any of the plaintiffs personally.

The defendants demurred to the petition. By entry the court overruled the demurrer, the entry reciting that the defendants did not elect to plead further. The entry continued by reciting that the court found in favor of the plaintiffs and that they are entitled to the relief asked in the petition and that "It is therefore ordered and adjudged that the title of said plaintiffs in and to the said lands described in their petition be and it is hereby forever quieted in said plaintiff Estella M. Scott, for and during the term of her natural life, and in said plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott after the determination of the life estate of Estella M. Scott in fee simple in remainder against any claim or demand of said defendants or either of them."

Flossie Scott married one Clarence E. Wohlheter. She died in 1931 leaving a will by which she devised to her husband who survived her "all real estate of which I may die seized of, my share in the farm known as the John B. McLean, Washington C. H. Ohio now owned by Estella McLean Scott."

Estella M. Scott died in 1948 survived by the present plaintiffs her son and daughter.

In 1953 Clarence E. Wohlheter conveyed his interest to the defendant Wilson by quit claim deed.

As the rule in Shelley's case was not abolished as to deeds in Ohio until 1941, it may be interesting to speculate as to the effect of the conveyance by deed of 1906 from McLean. Plaintiffs contend that it conveyed a fee tail. The defendant denies that it had that effect.

The classical examples of applications of the rule are that a conveyance to "A for life with remainder to his

heirs" creates a fee simple in A and that to "A for life with remainder to the heirs of his body" creates a fee tail. But at bar we have a conveyance to "A for life with remainder to the heirs of her body *their heirs and assigns forever*" (emphasis added). Does this then prevent the operation of the rule by a showing that the words "heirs of the body" were after all to be construed as words of inheritance since fresh limitations were grafted thereon by the addition of well established words of limitation, namely "their heirs and assigns forever"? See 36 O. Jur. 609. And, accordingly, would not the conveyance be one of a life estate with contingent remainder in the heirs of the body of the life tenant in fee simple?

If it were necessary to classify with nicety the estates created by the deed of 1906 the court would be inclined toward the latter interpretation. However, under the facts as they exist, the ultimate effects of each of the three interpretations mentioned are the same.

If the conveyance amounted to a conveyance of a fee simple in Mrs. Scott, it would pass to her surviving children, the plaintiffs, as her heirs at law under intestate succession and the husband of the daughter Flossie who died several years before the death of the mother would take nothing under the will of Flossie. If the deed conveyed a fee tail the effect would be the same. Dungan vs. Kline, 81 O. S. 371. And, again, if the conveyance were to be construed as granting a life estate with remainder to the heirs of the body of the life tenant in fee, the remainder would be conditional upon the life tenant's leaving heirs of the body and as no one has heirs while living, the fee would vest in the surviving children of Mrs. Scott and again, as Flossie had no interest subject to alienation in her lifetime, she could devise no interest by her will.

But the defendant contends that the effect of the conveyance of 1906 has been altered by the litigation of 1917

and the judgment therein. It is urged that the interests of the parties to that action were determined and that the present controversy is res judicata; that Flossie acquires a vested remainder in fee simple subject to the life estate in her mother by the judgment in that case—a title by judgment—and that the present plaintiffs are estopped to deny the defendant's title by reason of that litigation.

The question of the estates of the plaintiffs inter sese was not in issue in the litigation of 1917, and therefore, any judgment purporting to fix and determine those interests inter sese would be a nullity. Consequently no title could be derived from such a judgment nor could it be the basis of an estoppel.

Nor could the averments of a petition filed on behalf of Mrs. Scott and her children as plaintiffs, one of whom was a minor, signed and verified by an attorney and not by any one of the plaintiffs be the basis of an estoppel as between such plaintiffs.

In passing, it would seem that the court's decision in the litigation of 1917 must have been based on the effective legality of the deed, rather than on the effectiveness of either will as a conveyance, since the second will would have revoked the first and the validity or invalidity of either will could not have been adjudicated on demurrer.

Defendant further contends that plaintiffs should not be permitted to maintain this action because of a previously filed action in this court in which the Fayette County Agricultural Society sought to appropriate the land and in which the parties here were defendants, on the theory that the court in such case would determine the rights of the parties in making any distribution of the price paid by the society for the land. However, another judge sitting in this court, after hearing that cause, denied the society the right of appropriation. The appeal of the society is now pending.

Although the court is not aware of any authority directly in point since the adoption of the present appellate procedure, it would seem that until that judgment of the trial court is reversed on appeal, it remains as a judgment, where the appeal is on law and not on law and fact.

And under the judgment denying the right to appropriate, of course, there would be no question of distribution of the proceeds of sale. The court does not feel that the defense of other suit pending has been sustained by the defendant. Moreover, defendant here by cross-petition seeks an accounting of rents. Such a question could not be decided in the appropriation case in any event.

In view of the foregoing, it is not necessary for the court to pass on other issues of the case argued in the briefs.

The prayer of the petition will be granted and that of the cross-petition denied with plaintiffs recovering their costs. An entry accordingly will be prepared by counsel for plaintiffs, submitted to counsel for defendant and thereafter to the court.

April 12, 1955.

KIRK
Judge

APPENDIX B

IN THE COURT OF APPEALS, FAYETTE COUNTY, OHIO

No. 279

EARL LEROY SCOTT, et al., *Plaintiffs-Appellees*

vs.

HERBERT WILSON, *Defendant-Appellant*

and

EDITH SCOTT, et al., *Defendants-Appellees.*

Opinion

Rendered on the 8th day of November, 1955.

APPEARANCES:

MR. CARRINGTON T. MARSHALL, 218 North Parkview, Columbus, Ohio,

For Plaintiffs-Appellees.

BROWNFIELD & MALONE, Broad Street, Columbus, Ohio,

For Defendant-Appellant.

CONN, J., of the Sixth District sitting by assignment:

This is an appeal by defendant on questions of law from a judgment rendered by the common pleas court in favor of plaintiffs-Appellees and against defendant-appellant.

This action was brought to quiet title to a parcel of real estate consisting of 47,033 acres in Union Township, Fayette County, adjoining the city limits of Washington Court House, and described in plaintiff's petition by metes and bounds. Issues were raised on the petition, the answer and cross-petition of defendants and the reply of plaintiffs.

Plaintiffs allege that they are now and for a long time have been in possession of said real estate; that they have title in fee simple to said land as tenants in common; that defendant claims on undivided one-third interest therein, which claim of defendant is without any right whatever.

Plaintiffs pray that their title and possession of said property be quieted and that defendant be forever barred from having any right, title or interest therein.

The claims of possession and fee simple title set forth in the petition of plaintiffs are specially denied by defendant.

In the second and third defenses, as designated, defendant alleges that at the time plaintiffs began their action there was another action pending wherein the identical issue in this case must and will be determined.

Defendant further alleges that on or about July 9, 1917, Estella M. Scott, et al. filed her petition in the common pleas court, cause No. 14696, and that in said action it was adjudged by the court that Estella M. Scott (now deceased) held a life estate in the premises described in plaintiff's petition and that Flossie M. Scott, Esther Scott and Earl E. Scott held the remainder estate in said property in fee simple. It is further alleged in substance that Flossie M. Scott married one Clarence E. Wohlheter (defendants predecessor in title); that Flossie Scott Wohlheter died testate on November 20, 1941, and by the terms of her will she devised to her husband an undivided one-third interest in fee simple in said real estate; that thereafter Clarence E. Wohlheter conveyed by deed an undivided one-third interest in fee simple to the defendant herein.

That said judgment in cause No. 14696 was entered on the merits of the case; that the interests of the plaintiffs herein and defendant's predecessor in ti in the real estate described in the petition in said cause, including the premises described in plaintiff's petition here, constituted the sole issue in said action and that said judgment is res judicata and binding on the parties hereto.

Defendant in his cross-petition alleges he is seized in fee simple of an undivided one-third of said real estate and seeks an accounting for rents and profits.

The affirmative allegations in defendants' answer are denied by plaintiffs in their reply. The further averments therein are argumentative and evidentiary in character and do not appear to raise any affirmative issues.

The evidence offered at the trial is almost exclusively documentary and free from conflict.

The evidence discloses that one John R. McLean (unmarried) conveyed by deed to his daughter, Estella Scott, also known as Estella M. Scott, a life estate in a large tract of land in Union Township, Fayette County, Ohio, including the premises described in plaintiffs' petition, and the remainder to the heirs of her body, their heirs and assigns. The language creating the life estate and the limitation over is found in both the premises of the deed and in the habendum clause.

January 2, 1917, Estella M. Scott, Flossie M. Scott, Esther Scott and Earl E. Scott, a minor by Estella M. Scott, his next friend, as plaintiffs, brought an action to quiet title to said lands in the common pleas court, cause No. 14696, against Mary E. McLean, D. R. McLean as executor of the estate of John B. McLean, Benjamin R. Barbee, as executor of the estate of John R. McLean, deceased, Barzillai O. McLean and Zenas B. McLean, as defendants.

A transcript of the case was introduced and received in evidence upon the trial in the instant case. The finding and judgment are set up in the third defense of defendants' answer herein.

The record is lengthy and includes the pleadings, amendments thereto, motions and special demurrer addressed to plaintiffs' petition, as amended, and the finding and judgment of the court.

In view of plaintiffs' contention, we deem it necessary to set forth in some detail the issues raised on the pleadings and evidence. The allegations in plaintiffs' petition, material here, are as follows: Plaintiffs allege that on April 3, 1906, John M. McLean, unmarried, conveyed by duly executed deed a life estate in certain lands in Union Township, Fayette County, including the premises described in plaintiffs' petition in the instant case, to Estella M. Scott for life and to the heirs of her body an estate in remainder therein in fee simple; that subsequently to the execution of said deed, John R. McLean intermarried with one Mary F. McLean; that John R. McLean died May 26, 1916, leaving a last will and testament dated July 24, 1914, in which he devised the real estate in question to Estella M. Scott for life and the remainder to her children in fee simple; that said will was duly admitted to probate and recorded in the probate court of Franklin County, Ohio; and that defendant Benjamin R. Barbee was appointed executor of said estate.

That thereafter said John R. McLean sustained a serious head injury, and became incapacitated and was adjudged an imbecile; that a guardian was appointed and thereafter, on December 29, 1915, said ward executed a paper writing which was admitted to probate and recorded in the probate court of Fayette County, as the last will and testament of said John R. McLean; that Item IV of said will purports to give and devise to Mary F. McLean for her natural life 47 acres of land, known as the Washington Court House Fair Grounds, and after her death to the three grandchildren of deceased, Flossie Scott, Esther Scott and Earl Scott, and to their heirs and assigns; that Item V of said pretended will purports to give 230 acres of land to his daughter, Estella M. Scott, during her natural life, and at death to her three children absolutely and in fee simple.

It is further alleged that plaintiff Estella M. Scott is the owner of a life estate in said land and in possession

thereof, and that plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott are owners of the estate in remainder; that each of said executors claim the right to administer said estate; that defendants, Mary R. McLean, et al., claim some interest in said lands as beneficiaries under said respective wills; and that all of the claims of said defendants are adverse to the rights of plaintiffs and constitute a cloud upon their title to said real estate.

It further appears that service of summons was made on each of said defendants; that leave was granted plaintiffs to file an amended petition making the Fayette County Fair Co., and Charles Sargent parties defendant, and setting up certain claims for rentals, which are not important here.

Other proceedings were had in making up the issues in the case, containing eight specifications to strike and to separately state and number, which motion was overruled.

Thereupon, defendants Mary F. McLean and D. R. McLean, as executor, demurred specially to plaintiffs' petition and amendment thereto, alleging among other things that the petition of plaintiffs does not state facts constituting a cause of action. The trial court found the demurrer not well taken and overruled same.

Thereupon "said cause was submitted to the court upon the pleadings and the evidence, and representations and admissions of fact on behalf of said parties." The court found in favor of plaintiffs "and that they are entitled to the relief asked for in said petition." Judgment was entered quieting the title of plaintiff Estella M. Scott in and to said lands, for the term of her natural life, and in said plaintiffs, Flossie M. Scott, Esther Scott and Earl E. Scott in fee simple in remainder, against the claims of said defendants. The Fayette County Fair Co. and Charles Sargent were enjoined from asserting any interest in said real estate.

In the instant case, further documentary evidence was received as follows: A certified copy of the will of Flossie Scott Wohlheter, dated August 13, 1930, wherein it appears that said testatrix devised all her real estate, including her share in the John B. McLean farm to Clarence E. Wohlheter; also the certificate of transfer of said real estate to said devisee; also a certified copy of the quit claim deed of Clarence E. Wohlheter to the defendant Herbert Wilson, for the real estate described in plaintiff's petition; also the assignment to said grantee of certain rents and claims; certified copies of said wills of John B. McLean were introduced in evidence. Some further documentary evidence was received in evidence, but we do not regard it as being material in the determination of the issues presented on the record.

Alleged errors of the trial court are assigned and chiefly relied on by defendant in oral argument and brief are grounded on the claim that its judgment amounts to a collateral attack on the judgment in the earlier action, cause No. 14696, and that said judgment is res judicata; also that the court erred in finding that defendant has no interest in said property and in dismissing defendant's cross-petition.

We have given careful consideration to the issues raised on this appeal, and particularly to the claim that the trial court's judgment is a collateral attack on the judgment in cause No. 14696.

The evidence discloses, and it is not disputed, that the court had jurisdiction of the subject matter of the action and of the parties. The evidence discloses no irregularity in the proceedings and none is claimed.

For purposes of the demurrer, it admitted all facts well pleaded. No application was made to plead further, and thereupon the cause was submitted and the court adjudicated the issues in favor of plaintiffs and entered judgment as prayed for. As already pointed out, the

court determined that Estella M. Scott had an estate for life in said lands and that plaintiffs, Flossie M. Scott, Esther Scott and Earl A. Scott, had remainder estates in fee simple.

No appeal was taken from this judgment, nor does it appear that said judgment had ever been subject to direct attack. Under these circumstances, defendant claims that the rule inhibiting collateral attack against judgments regularly entered is applicable, and that on the whole record no successful attack on the validity of the judgment can be made in this action.

Plaintiffs contend that in view of the character of the proceedings in the earlier case, cause No. 14696, the trial court was without authority to find and adjudge that plaintiffs Flossie M. Scott, Esther Scott and Earl E. Scott had fee simple estates in remainder; and that the doctrine of res judicata does not apply. The predicate for this claim, as presented by the distinguished counsel for plaintiffs, deserves careful examination.

Three answers are suggested to defendant's contention and it is claimed that any one is conclusive.

First, Flossie, Esther and Earl were neither necessary nor proper parties. We will first consider the merits of this claim of plaintiffs.

The Code provides that an action must be prosecuted in the name of the real party in interest (Sec. 2307.05, R. C.), and that all persons having an interest in the subject matter of the action may be joined as plaintiffs (Sec. 2307.18, R. C.).

This latter section in its terms is not mandatory, as it relates to persons who are not united in interest but who have any legal or equitable interest in the subject of the action and in obtaining the relief demanded.

See Clark, Exec., et al. v. The McLain Fire Brick Co., 100 Ohio St., 110; 30 O. J., 750, Sec. 36.

We call attention to Sec. 5303.01 R. C. which authorizes a person out of possession, who claims an interest in remainder or reversion to maintain an action to determine his interest therein. The joinder of the life tenant and her children as parties plaintiff accords with this section of the Code.

It is in point to note that an issue of defect of parties may be raised by demurrer. As pointed out above, the demurrer of defendants was overruled. The court by its judgment determines issues. Issues are raised on the pleadings and the evidence. In the instant case, the trial court not only had before it the deed of John R. McLean, but also his subsequent will (the validity of which was not challenged), which devised to the three children of the life tenant estates in remainder in fee simple. In our opinion, the children of the life tenant were necessary parties to the action in cause No. 14696, in view of their interest in the subject matter, and the contention of plaintiffs should not be sustained.

Assuming that the contention of plaintiffs were sound and that said children of the life tenant, under the limitation in the deed, had an expectancy, a mere possibility only, such conclusion would not be decisive as the trial court had before it the valid will of John R. McLean, wherein said testator had devised to said three children estates in remainder in fee simple.

In view of our conclusion that the children of the life tenant were proper and necessary parties in cause No. 14696, and that the pleadings and the evidence put in issue the right, title and interest of said children respectively, each having an equal share in and to the estate of their grandfather, John R. McLean, it follows that the second and third questions, to wit: that no issue was joined between Flossie and her sister and brother and that Sec. 10512-4 G. C. (now Sec. 2131.04 R. C.) did not become effective until after the death of Flossie, are

each unrelated to said judgment in the early case and are untenable.

It is also contended by plaintiffs that the quiet title suit brought by Clarence E. Wohlheter against the defendant, Estella M. Scott, June 23, 1934, cause No. 18145, wherein the court found that said defendant had a life estate in said property and quieted her title thereto against plaintiff is decisive of the case at bar. The remainder interests were not involved in this action.

Plaintiffs also claim that any possible claim of Wohlheter and of defendant in the instant case was barred by the statute of limitations. If our conclusion be correct that the judgment in cause No. 14696 is not subject to collateral attack and is res judicata, said claims of plaintiffs are clearly untenable.

It is our conclusion that the judgment of the trial court in cause No. 14696 adjudged the right, title and interest of plaintiffs respectively in that action; that the remainder interest in fee simple of each of the three children was vested, and that said judgment is res judicata.

In view of our conclusion, no consideration need be given to other assignments of error.

Without extending this discussion further, and in view of the whole record, the judgment of the trial court should be reversed and this cause remanded to the trial court for further proceedings according to law.

Reversed and remanded.

Miller, P. J. and Hornbeck, J., Concur.

IN THE COURT OF APPEALS OF FAYETTE COUNTY, OHIO

No. 279

Filed Nov. 21st, 1955

EARL LEROY SCOTT AND ESTHER SCOTT CRONE,
Plaintiff-Appellees,

vs.

HERBERT WILSON, *Defendant-Appellant,*

and

EDITH SCOTT AND HARRY CRONE, *Defendant-Appellees.*

Entry

The parties appeared by their attorneys and this cause came on to be heard upon appeal on questions of law, original papers, assignments of error, bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Fayette County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid, being Cause No. 21843 on the docket of the Court of Common Pleas of Fayette County, Ohio, there is error manifest upon the face of the record to the prejudice of the Defendant-Appellant, in this, to-wit:

> That the court below should have found and adjudged that Cause No. 14696 on the docket of the Court of Common Pleas of Fayette County, Ohio, adjudged the right, title and interest of Plaintiff-Appellees and Flossie Scott, Defendant-Appellant's predecessor in title, in the real estate concerned therein; that the undivided one-third (⅓) remainder interest of each of said persons was vested; that said judgment is res judicata and cannot be collaterally attacked; that the

Petition of Plaintiff-Appellees should be dismissed; and that the prayer of Cross-Petition of Defendant-Appellant should be granted.

It is therefore considered, ordered and adjudged by this Court that the said judgment and proceedings of the Court of Common Pleas of Fayette County, Ohio in said Cause No. 21843, be and the same is hereby reversed and held for naught, and that this cause be and the same is hereby remanded to said Court of Common Pleas for further proceedings in accordance with this judgment, the opinion of this Court and the law.

It is further ordered that the said Plaintiff-Appellees pay the costs of this appeal taxed at $....., and, in default thereof, that an execution issue therefor.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Fayette County, Ohio, to carry this judgment into execution.

To all of which Plaintiff-Appellees except.

.....

.....

.....

Approved:

.....

BROWNFIELD & MALONE
Attorneys for Defendant-Appellant

.....

CARRINGTON T. MARSHALL
Attorney for Plaintiff-Appellees

APPENDIX C

THE STATE OF OHIO, CITY OF COLUMBUS
THE SUPREME COURT OF THE STATE OF OHIO,
Of the Term of January, A.D. 1956
To-wit: Wednesday, February 8, 1956

Filed Court of Appeals, Fayette County, Ohio, April 27, 1956.

DOROTHY L. WEST,
Clerk

No. 34670

EARL LEROY SCOTT, et al., *Plaintiffs-Appellants*

vs.

HERBERT WILSON, *Defendant-Appellee*

Motion for an Order Directing the Court of Appeals of Fayette County to Certify Its Record

It is ordered by the Court that this motion be, and the same hereby is, overruled.

THE STATE OF OHIO, CITY OF COLUMBUS
THE SUPREME COURT OF THE STATE OF OHIO,
Of the Term of January, A.D. 1956
To-wit: Wednesday, February 29, 1956

No. 34670

EARL LEROY SCOTT AND ESTHER SCOTT CRONE,
Plaintiffs-Appellants

vs.

HERBERT WILSON, *Defendant-Appellee*

Application for Rehearing

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

Supreme Court, U.S.
FILED
AUG 16 1956
JOHN T. FEY, Clerk

No. 100.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

EARL LEROY SCOTT, AND HARRY D. OBONE, EXECUTOR ESTATE OF ESTHER SCOTT OBONE, DECEASED,

Petitioners,

vs.

HERBERT WILSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

[illegible]
[illegible]
[illegible]
Counsel for Respondent.

[illegible]
Of Counsel.

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ARL LEROY SCOTT, AND HARRY D. CRONE, EXECUTOR ESTATE OF ESTHER SCOTT CRONE, DECEASED,

Petitioners,

vs.

HERBERT WILSON,

Respondent.

RIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

QUESTIONS PRESENTED.

The actual issues in the courts below were quite simple. ne legal rules governing these issues have been pro-unced by the Ohio courts and are not open to question.

The Ohio Court of Appeals simply applied the well settled Ohio law to the facts, which are complicated but almost wholly free from dispute. In any event no federal question has at any time been involved, urged or passed upon by any court below.

The questions of law involved are as follows:

1. As a matter of Ohio law, can a 1917 judgment of the Court of Common Pleas of Fayette county, Ohio, which was never appealed and was never reformed or vacated, be collaterally attacked in 1954 in an action in that same court between parties and privies to parties to the original action?

2. Can the Ohio statute of limitations run against a remainderman prior to the termination of an intervening life estate?

These were the true issues presented to the Ohio Court of Appeals, are the questions decided by that court and are the only ones actually present in the case. The questions presented in the petition fail squarely to acknowledge and meet the true issues, as follows:

(a) No federal or constitutional question has at any point prior to the petition for writ of certiorari been urged by petitioners or passed upon by any court.

(b) Both courts below held that there were no fee tail estates involved here, and no court has ever held that there were from the 1917 judgment to date. This case presents no question of a remainder in fee tail being alienable or devisable (p. 4a, Appendix A; p. 14a, Appendix B).

(c) There can be no question concerning the applicability of statutes of limitations, since, as the Ohio Court of Appeals held, statutes of limitations do not begin to run against a remainderman until an intervening life estate has terminated.

STATEMENT OF CASE.

Petitioners' statement of the facts deviates from the record in a number of particulars, omits relevant matters and includes numerous legal conclusions and inferences contrary to the facts as found by the courts below. With the following corrections, additions and modifications we are in general agreement with the facts stated by petitioners:

(a) The April 3, 1906, deed was not a conveyance of fee-tail estates. Furthermore, the deed was not delivered at the time of its execution, but was placed with other persons for delivery after the death of grantor.

(b) The dispute leading to the 1917 action, Cause No. 14696, was not merely between the widow of John B. McLean and his daughter. His grandchildren, petitioners and their since deceased sister, Flossie Scott, were parties plaintiff to the resulting action. To state that the daughter's claim was based on the deed of April 3, 1906, is incorrect, for although in their petition Estella M. Scott and her three children mentioned the deed of April 3, 1906, they also alleged that the first will of July 24, 1914, was the valid last will of John B. McLean. Estella M. Scott and her three children at no time claimed that their interests were interests in fee tail, but they specifically claimed that Estella had a life estate and that each of the three children owned a remainder in fee simple. Of course no guardian *ad litem* was ever appointed for the minor plaintiff, Earl Leroy Scott, since this procedure is only resorted to in Ohio when a minor is a party defendant. When a party plaintiff, the minor sues by a next friend, as here.

The 1917 judgment in Cause No. 14696 did not find that the deed prevailed. Without stating from which of several

possible sources title was derived, that judgment specifically determined and quieted title in Estella M. Scott for her life and in Flossie M. Scott, Esther Scott and Earl E. Scott in fee simple in remainder after the determination of the life estate of Estella M. Scott, just as those parties had requested the court to hold. This the Ohio Court of Appeals held to be binding on each of the named parties.

On the same day as the judgment in Cause No. 14696 was entered, the same court entered judgment in Cause No. 14760 (an action to contest the second will dated December 29, 1915, between the same parties involved in Cause No. 14696, and others) sustaining the will of December 29, 1915.

The 1917 judgment in Cause No. 14696 was never appealed and no party has ever attempted to have it reformed or vacated.

(c) Flossie Scott Wohlheter specifically devised her undivided one-third remainder in fee simple in the involved 47 acres to her husband, Clarence, and the Probate Court of Franklin county, Ohio, ordered it transferred to him.

(d) Clarence Wohlheter asked no relief against the petitioners here in Cause No. 18145, but prayed that his title be quieted against Estella M. Scott (the life tenant) only, who answered alleging that she owned a life estate as determined by Cause No. 14696 and that the judgment in that action was *res judicata*. The judgment in Cause No. 18145 quieted the title of Estella M. Scott against Clarence Wohlheter "for and during her natural lifetime."

(e) The constitutional question alleged to be presented has never been raised in any manner in this action prior to the filing of this petition for writ of certiorari. Contrary to the statement at page 11 of the petition, the alleged

constitutional question was not raised by assignments of error filed in the Supreme Court of Ohio, as no assignments of error were ever filed in such court. Under the Ohio practice, it is customary to take an appeal as of right to the Ohio Supreme Court when a constitutional question is claimed. The petitioners failed to do so here, but instead filed their motion to certify in that court merely alleging questions of public and great general interest without mention of any constitutional question.

REASONS FOR NOT GRANTING THE WRIT.

I.

The Federal Question Alleged to be Presented Was Not Raised in or Passed Upon by Any State Court.

The principle that federal constitutional questions must be raised in state courts before they will be considered by this Court is too well established to require citation. The petition for writ of certiorari raises the alleged federal question for the first time, and neither of the three (3) Ohio courts ever passed upon such question. This Court has consistently held, as a jurisdictional matter, that a writ of certiorari to a state court will be dismissed when the record, as here, fails to show that the federal question indicated in the petition for the writ was raised or passed upon below. *White River Co. v. Arkansas*, 279 U. S. 692, 73 L. Ed. 903; *Missouri Pacific Railroad Co. v. Hanna*, 266 U. S. 184, 69 L. Ed. 235.

II.

No Federal Question Has Been Presented to This Court.

Petitioners' claims may be stated as follows:

(a) The court below, in holding that the 1917 judgment was *res judicata* so as to deny their claim of complete ownership of the real estate, erred and thus deprived them of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) The court below committed other errors.

All errors alleged to have been committed were errors in the application of or refusal or failure to apply what petitioners consider to be the correct Ohio law to the facts of the case. No claim is made that any Federal statutes or treaties are involved, and the only claim involving the Federal Constitution is the one that because of an erroneous judgment petitioners have been denied due process of law.

This Court has on a number of occasions held such contentions to be without merit. Mere error, if any, of a court in a judgment entered after full hearing does not constitute a denial of due process. *Corrigan v. Buckley*, 271 U. S. 323, 70 L. Ed. 969; *Dunbar v. New York*, 251 U. S. 516, 64 L. Ed. 384; *Bonner v. Gorman*, 213 U. S. 86, 53 L. Ed. 709.

In the case of *Tracy v. Ginzberg*, 205 U. S. 170, 51 L. Ed. 755, this Court held:

> "The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property, without due process of law, simply because its effect is to deny his claim to own such property. The Fourteenth Amend-

ment did not impair the authority of the States to determine finally, according to their settled usages and established modes of procedure, such questions, when they do not involve any right secured by the Federal Constitution or by any valid act of Congress, or by any treaty."

Petitioners specifically claim that the determination that the 1917 judgment was *res judicata* denied them due process, and imply that failure of the court below to apply prior Ohio law concerning alienability or devisability of remainders in fee tail (even though both courts considering the question held the estates of the various parties were not in tail) had a like result. This Court has decided both contentions to the contrary.

Possible error in a judicial determination that former judgments are *res judicata* in an action concerning title to real estate does not constitute a denial of due process of law. *Jones v. Buffalo Creek Coal Co.*, 245 U. S. 328, 62 L. Ed. 325.

A departure by state decision from a rule of property established by earlier state decisions may not be relied on, without more, as a violation of the Fourteenth Amendment. *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 68 L. Ed. 382; *O'Neil v. Northern Colorado Irrigation Co.*, 242 U. S. 20, 61 L. Ed. 123.

Finally, petitioners urge that respondent is barred by the Ohio statute of limitations. As a matter of Ohio law for a number of reasons this claim has no merit. But assuming that the courts below decided this question erroneously, does the Constitution of the United States prohibit Ohio courts from committing errors in the application of Ohio law to a factual situation? We think not.

CONCLUSION.

The Court of Appeals of Fayette county, Ohio, committed no errors in adjudging that respondent is entitled to an interest in the real estate involved here. Neither that Court of Appeals nor the Supreme Court of Ohio, in overruling petitioners' motion to certify the record or denying petitioners' application for rehearing, has deprived petitioners of their constitutional rights without due process of law.

Not only has no federal question been presented to this Court but the alleged question of violation of due process of law guaranteed by the Fourteenth Amendment is raised in this Court in the first instance. As stated by this Court in *Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673 (680), 74 L. Ed. 1106:

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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BROWNFIELD AND MALONE,
Of Counsel.

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